INDEX

TABLE OF CITATIONS

754-755—64——1

Cases—Continued

Statutes and Regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

FEDERAL POWER COMMISSION, PETITIONER

v.

M. H. MARR, SUN OIL COMPANY, CONTINENTAL OIL COMPANY, GENERAL CRUDE OIL COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit, entered on August 3, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (U.G.I. Pet. 3a–14a) [1] is reported at 336 F. 2d 320. The opinion and orders of the Federal Power Commission (R. 962–984, 1223–1233) are reported at 29 FPC 249 and 30 FPC 153.

---

[1] "U.G.I. Pet." refers to the petition for a writ of certiorari in No. 644, this Term, filed in this case by the United Gas Improvement Company. The opinion and judgment of the court below are printed in Appendices A and B, respectively, to that petition.

JURISDICTION

The judgments of the court of appeals setting aside the Commission's order were entered on August 3, 1964 (U.G.I. Pet. 17a). By order of Mr. Justice Black, dated November 2, 1964, the time for filing a petition for a writ of certiorari was extended to November 16, 1964.

QUESTION PRESENTED

Whether the sale by an independent producer to an interstate pipeline company of a leasehold interest in proven natural gas reserves, for use by the pipeline in supplying its interstate markets, constitutes a sale of "natural gas" subject to the jurisdiction of the Federal Power Commission.

STATUTE INVOLVED

The Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717-717w, provides in pertinent part:

> Section 1(b). The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.
>
> Section 2. When used in this Act, unless the context otherwise requires—
>
> * * * * *

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

STATEMENT

This case involves the jurisdictional status, under Section 1(b) of the Natural Gas Act, of the sale of proven natural gas reserves in the Rayne Field in Louisiana to Texas Eastern Transmission Corporation, a pipeline, for use in supplying its interstate markets. The case arises out of Texas Eastern's application for a certificate of public convenience and necessity, pursuant to Section 7(c) and (e) of the Act, for facilities required to transport the gas from Rayne Field for delivery into its interstate pipeline system.

The Factual Background.—On February 1, 1957, Texas Eastern, which has an interstate natural gas transmission system extending from Texas to the Philadelphia-Newark area, executed contracts with Continental Oil Company, M. H. Marr, Sun Oil Company, and General Crude Oil Company to purchase their natural gas production in the Rayne Field at an initial price of 23.9 cents per Mcf, including 1.3 cents per Mcf for reimbursement of State taxes. In April 1957, Texas Eastern applied for a certificate authorizing it to construct and operate a compressor station and pipeline needed to transport natural gas from Rayne Field to Opelousas, Louisiana, where the gas was to be delivered into its existing pipeline system. At about the same time, the producers applied

for certificate authority to sell their gas to Texas Eastern. After a hearing, and despite objections to the 23.9 cent price by the Commission's staff and a number of intervenors, the examiner issued a decision on April 15, 1958, proposing to grant unconditioned certificates to each of the applicants (R. 367–405, 21 FPC 869–886).

On June 30, 1958, before the Commission had acted on exceptions to the examiner's decision, the Court of Appeals for the Third Circuit in *Public Service Commission of New York* v. *Federal Power Commission*, 257 F. 2d 717, affirmed *sub nom. Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (the "Catco" case) set aside an order of the Commission granting unconditional certificates for sales of gas from offshore Louisiana at 22.4 cents per Mcf (including a one-cent tax reimbursement)—a figure 1.5 cents lower than the price charged Texas Eastern—on the ground that the price had not been justified.

Within a month of the lower court's decision in *Catco,* three of the producers cancelled their original contracts with Texas Eastern and requested Commission approval for withdrawal of their certificate applications (R. 406–410).[2] In September 1958, Texas Eastern filed a petition to reopen the hearing and to amend its application.

The parties then formulated a new plan, under which Texas Eastern was to construct essentially

---

[2] The contracts had permitted the producers to terminate their agreements since September 1, 1957 (*e.g.*, R. 409).

the same facilities as those previously proposed and was to receive into its interstate pipeline system the same volumes of gas (R. 965). The only difference was that Texas Eastern now agreed to acquire leasehold interests in the reserves which the producers had formerly committed to standard-type gas purchase contracts with Texas Eastern.

To effectuate the plan, the four Rayne Field producers—Continental, Sun, Marr and General Crude—entered into a contract on December 4, 1958, (designated "Lease Sale Agreement") with Louisiana Gas Corporation, a wholly owned subsidiary of Texas Eastern. Since Texas Eastern, by a contract concurrently executed, was to have the right to acquire the title to the lease from Louisiana Gas, Texas Eastern has been treated throughout this litigation as the real purchaser (R. 965).

Under this agreement, the producers conveyed their leasehold rights to gas down to the base of the Nodosaria "A" Sand at a depth of from 13,650 to 13,890 feet, together with wells and related equipment, but reserved their "leasehold rights to the oil and other minerals, except gas and condensate", as well as to the gas and condensate below the Nodosaria "A" Sand (R. 186–188). While the agreement in terms conveyed the liquids, or "condensate",[3] to be extracted from the gas, it also provided that the producers would receive as "production payments" all proceeds from the sale of the condensate in excess

[3] Condensate is defined in the agreement as certain liquid and liquefiable hydrocarbons contained in the gas stream (R. 185).

of the costs of operating the leasehold and of processing expenses (R. 188–191).[4]

The lease-sale agreement between the producers and Texas Eastern was executed with the understanding (R. 828–829) that Continental, which had previously operated the field for itself and the other producers, would continue to conduct all operations, including drilling, developing and managing the wells and well equipment. A "Management Agreement" to this effect was signed on July 27, 1959 (R. 827–858).

Consideration for the conveyance was $134,395,700, of which $12,420,500 was paid in cash and the balance in promissory notes payable in 16 annual installments (ending in 1975). If, at Texas Eastern's nomination, gas production exceeds a specified amount, payment of the notes is to be accelerated (in inverse order of maturity) in accordance with a prescribed formula (R. 350–351).

While the exact amount of the recoverable reserves in the Rayne Field was a matter of controversy, they are admittedly substantial; Texas Eastern's estimate exceeds 900,000,000 Mcf (R. 966).

The lease-sale agreement was expressly conditioned upon the issuance by the Federal Power Commission of certificates of public convenience and necessity for the construction and operation of facilities required to take the gas from Rayne Field and to transport it

[4] The condensate is, in fact, being sold by Texas Eastern to the producers under long-term contracts which terminate when the production payments terminate. Thus, the producers buy the condensate and receive the net proceeds therefrom, while Texas Eastern retains none of the net proceeds from its sale (R. 582–587).

to the market area. Upon the issuance of certificates satisfactory to each party, the gas purchase contracts of February 1957 were to be cancelled (R. 175).[5]

Subsequent Proceedings.—The Commission granted Texas Eastern's request (*supra*, p. 4) for reopening the proceeding to consider the lease-sale plan and, on June 23, 1959, issued an unconditional certificate to Texas Eastern for its proposed facilities. In issuing the certificate, the Commission overruled the objection of the New York Public Service Commission that the record did not adequately disclose the costs of the leases to Texas Eastern, a showing which, in New York's view, required evidence of the costs of the producers.

On July 23, 1959, the New York Commission applied for rehearing (R. 467). Four days later, the transfer of the gas rights under the leases was completed and Texas Eastern began to receive gas from Rayne Field (R. 888)—gas which it has since transmitted and sold at wholesale in interstate commerce. Subsequently, the Commission denied rehearing (R. 476). On review, however, the Court of Appeals for the District of Columbia set aside the certificate order and remanded the case for further proceedings. *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143 (R. 862–868). The court held that, without substantial evidentiary support, "the language and tenor of the [Federal Power] Commission's Opinion and Order appear to confer general approval

[5] Three of the producers had purportedly cancelled their contracts at an earlier time. See, *supra*, p. 4.

upon the terms of the acquisition arrangement" (287 F. 2d at 145). On the assumption that the Commission had no jurisdiction over the lease-sale, the court stated that, regardless of the form of the transaction, the Commission was required to consider the acquisition costs of the pipeline. ~~before issuing a certificate.~~

The Proceedings on Remand.—On remand, the Commission reopened the proceeding. It afforded Texas Eastern an opportunity to show the reasonableness of its acquisition costs but did not limit the proceeding to that issue. In his decision, the examiner found that it was "virtually impossible, from the record, to determine the future costs to Texas Eastern for the Rayne Field since they are predicated upon assumptions and estimates" (R. 891–892). Nonetheless, he arrived at the conclusion that "when all [Texas Eastern's] costs, and estimated costs, are computed, the average cost becomes 24.34¢ per Mcf at 15.025 psia" (R. 896). Finding that this price was out of line and that the "in-line" price was 18.5¢ per Mcf (R. 897), he held that Texas Eastern should be granted a certificate conditioned upon the inclusion of the Rayne Field gas in the pipeline's cost of service at an initial price of 18.5¢ per Mcf (exclusive of taxes) and on its maintenance of supplemental accounts providing "summary and detailed data respecting the cost of the Rayne Field gas to Texas Eastern" (R. 897–898).

While noting that the Commission's staff and one of the intervenors "vigorously contend in their briefs the Commission does have jurisdiction over such [Rayne Field Lease] acquisitions" (R. 885), the

examiner held that the Commission was without jurisdiction "until (1) the gas was connected to an interstate system of pipelines or (2) the gas was dedicated to a sale in interstate commerce" (R. 887).

The Commission, on exceptions, concluded that the jurisdictional issue was not foreclosed by its earlier action in the case, and held that the transfer of gas to Texas Eastern constituted a sale in interstate commerce for resale, whether technically in the form of a leasehold transaction or otherwise.[6] It reasoned that the "fact that the gas, which had been developed to an extent where reasonable estimates could be made as to the available reserves, was sold in bulk rather than on a per Mcf basis does not change the nature of the sale" (R. 972). And it observed that the transaction by which Texas Eastern was obtaining the Rayne Field reserves, though in form a transfer of leasehold rights plus equipment, closely resembled, in practical effect, the ordinary sale of gas. In this connection, it found (R. 973):

> (1) Only gas in particular strata is conveyed; and the producers retain their interest in oil and other minerals;
>
> (2) In effect the transaction is for the sale of stripped gas inasmuch as the producers are to receive a production payment from Texas Eastern from the sale of natural gas liquids;
>
> (3) While the payment for the leases is represented by notes and spread over a 16-year period, the notes have an acceleration clause by

[6] The Commission expressly refrained from dealing with either the transfer of other property rights or the operation of the producing properties, wells or the equipment used for production and gathering (R. 972).

which payment is accelerated if production is increased, so that Texas Eastern's payments would be geared to production;

(4) By a management agreement dated July 27, 1959, Continental agrees to operate the field, including drilling wells and managing all wells and equipment, and to deliver to Texas Eastern specified minimum daily quantities of gas; Texas Eastern will reimburse Continental for its expenses in operating the field but the assignment of the leases shows that the costs of operating the leases will be defrayed out of the production payments to which Continental is entitled;

(5) It is Louisiana Gas, not Texas Eastern which is liable on the notes to the producers, so that the true purchaser of the gas [is] not bound by the principal obligation of the lease sale transaction.

Having decided that it had jurisdiction over the in-place sale of the Rayne Field gas reserves, the Commission concluded that it was not in the public interest to certificate the present transaction. It was not satisfied that the unit cost of the gas was reasonable or that it could be determined with reasonable accuracy. Rather than deny outright Texas Eastern's application, the Commission afforded it and the producers an opportunity to revise their contractual arrangements so as to furnish assurance that the transactions, already partially consummated, would be consistent with the public interest (R. 978-979, 1228-1229).

The Court of Appeals for the Fifth Circuit set aside the Commission order, holding that the contracts

transferred more than merely gas and hence were "lease"[7] transfers within the meaning of *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, and beyond the jurisdiction of the Federal Power Commission.[7]

REASONS FOR GRANTING THE WRIT

Section 1(b) of the Natural Gas Act (15 U.S.C. 717(b)) gives the Federal Power Commission jurisdiction over "the sale in interstate commerce of natural gas for resale," but not over "the production or gathering of natural gas." In *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 685, this affirmative grant of jurisdiction was held to cover all wholesales of natural gas in interstate commerce, whether by a pipeline or by an independent producer, and whether occurring before, during, or after transmission in interstate commerce. In the present case, a group of independent producers sold to Texas Eastern, an interstate pipeline company, their working or leasehold interests in certain substantially developed gas properties. In practical terms they transferred their right to withdraw gas from a proven, substantial, and well-defined body of reserves lying above a named geological stratum. Indeed, the gas was ready to flow from the reserves upon the turn of a valve.

[7] In view of its disposition of the case, the court found it unnecessary to reach the contention of petitioners below that the Commission was barred from considering its jurisdiction over the transaction as producer sales because the Court of Appeals for the District of Columbia had disposed of the eariler appeal on the basis of the absence of Commission jurisdiction over the sale as such.

However it may be viewed under the law of conveyancing, we urge that such a transaction, for regulatory purposes, amounts to a sale of the natural gas reserves underground, or, as it is sometimes termed, a sale of the gas "in place."

It is not disputed that the volumes of deliverable gas obtained by Texas Eastern from these properties are destined for resale in States other than Louisiana. The sole question presented, therefore, is whether the sale of these proven reserves constitutes a jurisdictional sale of "natural gas" within the meaning of Section 1(b), or whether such a transfer must be classified instead as an exempt "production or gathering" activity. We believe that the decision below, which adopts the latter view and thereby sanctions the unregulated transfer of a vast body of proven reserves, reflects an unrealistically narrow reading of the *Phillips* case and opens the door to ready evasion of the Commission's jurisdiction over producer sales. Certainly, the decision is one of fundamental importance.

1. In our view, a transfer of natural gas by a producer to an interstate pipeline company is subject to the Commission's jurisdiction whether it is accomplished by means of a conventional sale of gas at the wellhead after it has been brought to the surface or, as in the present case, by means of a sale of the producer's interest in proven reserves in the ground.[8] The essential similarity of the two transactions is

[8] The Commission has had no occasion to decide whether it would have jurisdiction over a sale of leases where the anticipated reserves have not been proven or developed.

apparent. In a conventional sale of gas at the wellhead, the pipeline agrees to take specified volumes for a prescribed period of time (usually 20 years) at a stated price per unit, while the producer, by "dedicating" a defined body of reserves to the particular sale, surrenders his right to dispose of those reserves elsewhere.[9] In the type of transaction involved here, the producer, rather than merely "dedicating" his reserves, transfers his interest in them to the pipeline company in return for an immediate lump sum payment plus a promise to make additional payments annually, and the pipeline is then free to draw upon those reserves so long as it continues to meet its periodic obligations. In both cases, the pipeline commits itself to pay a specified sum of money over a given period of time in return for a right to take gas from a defined block of reserves, while the producer gives up the right to sell those reserves to any other buyer.

The ready interchangeability of the two forms of arrangement is well illustrated by the circumstances of this case. As we have shown (*supra*, pp. 4–5), the lease-sale agreements were substituted for the prior wellhead sales only after the Third Circuit had set aside the Commission's order granting unconditional

---

[9] Dedication of reserves occurs as soon as deliveries commence (*e.g.*, *Atlantic Refining Co.* v. *New York Public Service Commission*, 360 U.S. 378, 387–389). Moreover, once service has commenced, a producer can terminate deliveries from the specified reserves only after received Commission approval, normally pursuant to Section 7(b), regardless of the term of its contract. *Sunray Mid Continent Oil Company* v. *Federal Power Commission*, 364 U.S. 137.

certificates for the somewhat lower priced, but otherwise comparable, sales involved in *Catco*. And the new arrangement contemplated the construction of the same facilities and the receipt by Texas Eastern of the same volumes of gas as were envisaged by the earlier sale.

We do not say that the two types of transaction are alike in every respect. But such differences in substance as there may be between the sale of a leasehold interest in gas reserves and the standard gas purchase arrangement can be minimized by the contracting parties almost to the point of insignificance. For example, in the conventional wellhead sale, the function of bringing the gas out of the ground is usually performed by the seller, whereas a sale of the reserves "in place" might be expected to shift that responsibility to the pipeline purchaser. Here, however, this distinction is all but obliterated by contractual provisions which assign to one of the producers (Continental) the task of drilling, developing and managing the wells.[10]

Another potential difference between a sale of gas at the wellhead and a sale of reserves "in place" is

[10] But even if the pipeline itself were called upon to operate the wells, that fact would not alter the jurisdictional status of the sale. The principal economic function of an independent producer is to seek out and develop new gas reserves; once that is done, the operation of going wells is a relatively minor part of its activity, whether in terms of cost or of effort. Indeed, even in the ordinary gas purchase arrangement, this final step in the production process is sometimes assigned to the pipeline purchaser, rather than to the seller. See, *e.g.*, *Continental Oil Co.* v. *Federal Power Commission*, 266 F. 2d 208 (C.A. 5), certiorari denied, 361 U.S. 827.

that in the former the producer, rather than the pipeline, bears the risk of premature exhaustion of the reserves and derives the benefit of any unexpected abundance. The sale of a leasehold interest, on the other hand, would seem to shift those uncertainties to the pipeline purchaser; since the pipeline agrees to pay a fixed price for the entire body of reserves, and since the amount of those reserves cannot be predicted with certainty at the time of the sale, the pipeline's outlay per unit of production will ultimately depend upon whether the reserves exceed or fall short of expectations. This shifting of risks, however, is by no means a necessary feature of a leasehold sale. In two other cases recently decided by the Commission, the parties to similar "in place" sales made provision for a later readjustment of the purchase price on the basis of a redetermination of the reserves. *Tennessee Gas Transmission Co., et al.*, 30 FPC 1477, Opinion No. 413, Docket Nos. CP61-106, et al. pending on review *sub nom. Pan American Petroleum Co., et al.* v. *Federal Power Commission*, C.A. 10, Nos. 7659, 7751; *Continental Oil Co., et al.*, Docket No. RI64-129, Order issued October 23, 1964, and the examiner's decision issued August 19, 1964.[11] In the present case, Texas Eastern accepted a measure of the risk that it had underestimated the reserves—a risk which

[11] In that case, the examiner, after finding that the in-place sale should be treated as jurisdictional, concluded nevertheless that he was bound by the Fifth Circuit decision in the present case to hold the transaction non-jurisdictional. The Commission adopted the examiner's decision, except the conclusion that the decision below was binding.

inheres in the fact that, under the contract, payments "lead" production. It is notable, however, that Texas Eastern organized a subsidiary (Louisiana Gas Corporation) which actually entered into the lease-sale agreement and that the subsidiary alone is obligated to the producers on the notes (*supra*, p. 10). Should the reserves show signs of giving out before the end of the payout period, this "shell" corporation could default on the notes and return the leases to the producers. Thus, the principal risk—failure of the reserves or their destruction at a relatively early date—remains with the producers. The fact that the reserves were not measurable with precision at the time of the contract, and that the pipeline assumed some of the attendant risk—while it might, as the Commission indicated (R. 976–977), cast doubt upon whether the entire transaction would serve the public convenience and necessity—is not determinative. The dominant consideration is that what the pipeline paid for was the producer's interest in a huge (albeit not precisely measurable) block of deliverable gas. Both in the economic sense and in terms of the regulatory objective—the protection of the ultimate consumers—there has been a sale of natural gas, not a mere transfer of an interest in real property.

2. It follows that the transfer is not exempted by the "production or gathering" clause of Section 1(b). For, as the Tenth Circuit pointed out in *Saturn Oil & Gas Co.* v. *Federal Power Commission*, 250 F. 2d 61, 68 (C.A. 10), certiorari denied, 355 U.S. 956, the

Phillips decision established "that the production or gathering exemption of Section 1(b) did not apply to exclude from the jurisdiction of the Commission sales by any producer of natural gas for transportation interstate for resale to the public."

The decision below appears to rest, in part at least, upon the erroneous premise that a sale of natural gas cannot be jurisdictional if it takes place before the production and gathering processes have run their course. The court below emphasized (U.G.I. Pet 12a) that in *Phillips* this Court was "able to find jurisdiction because [quoting this Court's opinion] 'production and gathering, in the sense that those terms are used in Section 1(b), end before the sales by Phillips occur.'" There is no indication in the *Phillips* opinion, however, that this circumstance—the prior termination of production and gathering—was essential to this Court's finding of jurisdiction. Moreover, until the decision below, no court of appeals had so interpreted *Phillips.* On the contrary, both the Tenth Circuit in *Saturn* and the Fifth Circuit itself in *Deep South Oil Co.* v. *Federal Power Commission,* 247 F. 2d 882, 888–889,[12] have upheld the Commission's jurisdiction over producer sales at the wellhead even though consummated

[12] In two companion cases in which the opinion in *Deep South* was followed certiorari was denied. *Shell Oil Co.* v. *Federal Power Commission,* 247 F. 2d 903 (C.A. 5), certiorari denied, 355 U.S. 930 and *Humble Oil & Refining Co.* v. *Federal Power Commission,* 247 F. 2d (C.A. 5), certiorari denied, 355 U.S. 930.

before the gas had been gathered.[13] To the extent that the decision below holds that the Commission's jurisdiction can attach only after production and gathering has come to an end, it is plainly at odds with the views of the Tenth Circuit in *Saturn*.

3. The Fifth Circuit's reliance upon *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, is misplaced. That case involved a quite different issue—namely, whether an interstate pipeline could, without the Commission's authorization, dispose in any manner whatever of undeveloped leases and reserves which had been included in its rate base and which it had relied upon to support its applications for certificates of public convenience and necessity. The Court had no occasion to consider the question presented here—*i.e.*, whether a transfer of proven reserves is tantamount to a sale of "natural gas"—since the gas to be produced from Panhandle's transferred leases was in no event intended for resale in "interstate commerce," but was to be consumed within the producing State. We note, moreover, that *Panhandle* antedated the *Phillips* case by some six years, and was decided at a time when the Commission had not asserted jurisdiction even over conventional sales of gas by independent producers at the wellhead.

To be sure, the Court stated in *Panhandle* that the leases were "an essential part of production" (at 505) and that "the transfer of undeveloped gas leases is an activity related to production and gathering of nat-

[13] See also *Continental Oil Co.* v. *Federal Power Commission*, 266 F. 2d 208 (C.A. 5), certiorari denied, 361 U.S. 827.

ural gas and beyond the coverage of the Act" (at 515). That broad language, however, must be read in the context of the issue actually before the Court, and, in any event, we submit, should be reevaluated in the light of the *Phillips* decision and the ensuing development of the Commission's jurisdiction over sales by producers.

4. If allowed to stand, the decision below would provide a simple mechanism for avoiding federal regulation over producer sales. The present arrangement, as we have indicated, was substituted for a conventional gas purchase agreement when the Third Circuit's decision in *Catco* made it apparent that producers' initial prices would henceforth be subject to careful scrutiny. This sale, involving reserves estimated at nearly a billion Mcf, is by no means an isolated example of attempts to use the device of an in-place sale to avoid effective Commission regulation of the price at which gas is purchased for the interstate market: Pan American Petroleum Company, for example, claims non-jurisdictional status for a similar arrangement with Tennessee Gas Transmission Company involving the sale of estimated reserves of about 750 million Mcf from the Bastion Bay field in Louisiana. Review has been sought of the Commission's determination that this sale was jurisdictional (*Tennessee Gas Transmission Co., et al.,* 30 FPC 1477, Opinion No. 413, Docket Nos. CP61–106 et al., December 12, 1963) and the case is now awaiting decision, *Pan American Petroleum Co., et al.* v. *Federal Power Commission,* C.A. 10, Nos.

7659, 7751. Similarly, the Catco companies have sold gas reserves, estimated at more than 500 million Mcf, in the Ship Shoal Field, offshore Louisiana, to Tennessee Gas Transmission Co. under a lease sale agreement. *Continental Oil Co., et al.,* Docket No. RI64-129.[14]

To be sure, the Commission would have power to examine these transactions in a proceeding to determine just and reasonable rates for the pipeline purchaser, and at that time could disallow such portion of the leasehold acquisition costs as it found to be improvident. That power, however, is scarcely a substitute for the ability to pass upon the terms and conditions of the sale at the time it is proposed and still subject to revision. If it were, there would be no need for the Commission to regulate producer sales at all, for it could protect consumers simply by making appropriate adjustments in the pipeline's cost of service. As the Commission noted in its opinion (R. 976), "[c]ontrol limited to approving the costs of the gas to the purchasing pipeline is, of course, not an effective way to regulate producer prices be-

[14] The parties to another proposed lease sale agreement substituted a conventional sales agreement after the examiner had found that the lease sale was jurisdictional and had refused to issue a certificate for related facilities since the lease sale transaction was not shown to be required by the public convenience and necessity. See *Tennessee Gas Transmission Co.*, 29 FPC 4.

On October 23, 1964, the Commission ruled that it has jurisdiction over the sale. It noted that it was not bound by the decision below, since the court of appeals had extended the stay of its mandate until November 11, 1964, and since the filing of a petition for certiorari was under active consideration.

cause in the large a pipeline must be allowed to pass on its purchased gas costs to the ultimate consumer or it cannot continue to discharge its public service responsibilities." [15]

---

[15] Nor is there any assurance that the Commission could effectively regulate these sales through the exercise of its power to certificate the construction of facilities, since the transfer might well be consummated, and the parties legally obligated, long before the pipeline sought authority to build the needed facilities for transporting the gas. And even if the transaction were presented to the Commission at an executory stage, it is questionable whether the Commission, through the exercise of its Section 7 conditioning powers, could retain the degree of continuing control over the transaction which could be exercised under Section 5 if the transaction were deemed a sale of "natural gas" in interstate commerce.

CONCLUSION

The decision below, if it stands, means that major producers and pipelines will be enabled to avoid the Commission's existing methods of regulating the price at which the former sell to the latter by the expedient of selling gas "in place" rather than under conventional gas purchase contracts. Thus, it may well present the most fundamental question from the standpoint of producer regulation since the *Phillips* decision in 1954. This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
RALPH S. SPRITZER,
FRANK GOODMAN,
Assistants to the Solicitor General.

RICHARD A. SOLOMON,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
PETER H. SCHIFF,
Attorney,
Federal Power Commission.

NOVEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964